

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

CITY OF GRASS VALLEY,)
) 2:04-cv-00149-GEB-DAD
Plaintiff,)
)
v.) ORDER*
)
NEWMONT MINING CORPORATION, a)
corporation; NEWMONT USA LIMITED,)
a corporation; NEWMONT NORTH)
AMERICAN EXPLORATION LIMITED, a)
corporation; NEW VERDE MINES LLC,)
a limited liability company;)
NEWMONT REALTY COMPANY, a)
corporation,)
)
Defendants.)
_____)

Defendants move for partial summary judgment under Federal Rules of Civil Procedure 56(b). Plaintiff ("the City") asserts in its complaint, *inter alia*, that Defendants are liable under section 107(a) of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), codified at 42 U.S.C. 9607(a), as owners or operators of a facility from which there has been a release of hazardous substances. (Pl.'s Third Amended Compl. ¶¶ 43-51.)

* This matter was determined to be suitable for decision without oral argument. L.R. 78-230(h).

Defendants seek partial summary judgment that would have the court (1) defining the facility at issue in this suit to be the Massachusetts Hill Mine Workings, (2) holding the City liable as a present owner under CERCLA section 107(a), and (3) holding that the Newmont entities are not liable as past (as opposed to present) owners or operators of the Massachusetts Hill Mine workings. (Defs.' Mot. at 2.) Plaintiff opposes the motion. Defendants' motion is denied for the reasons that follow.

I. Summary Judgment Standards

Summary judgment is appropriate if, when viewing the evidence in the light most favorable to the non-moving party, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); Lopez v. Smith, 203 F.3d 1122, 1131 (9th Cir. 2000) (en banc). The moving party has the burden of showing there is no genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986). There is no genuine issue of fact if, on the record taken as a whole, a rational trier of fact could not find in favor of the party opposing the motion. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). The evidence of the non-moving party is to be believed and all justifiable inferences are drawn in his favor. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986).

II. Defining the Facility as the Massachusetts Hill Mine Workings

In its Complaint, the City defines the facility at issue as "mines, mining waste, minerals, mine workings and other materials which are one or more of the mining features which connect to a mining feature known as Drew Tunnel. . . ." (Pl.'s Third Amended Compl. ¶¶ 45, 16.) Defendants assert that undisputed evidence "establishes that

1 the Massachusetts Hill Mine workings, including the Drew Tunnel, are
 2 not connected to any other mine workings or drainage tunnels in the
 3 area" and therefore, "there is no basis for expanding the geographic
 4 scope of . . . the 'facility' beyond the Massachusetts Hill Mine
 5 workings." (Defs.' Mot. at 8:13-9:3.) Plaintiff rejoins that defining
 6 the facility at issue is not a proper basis for summary judgment.
 7 (Pl.'s Opp'n at 4:11-23.)

8 Assuming Defendants' motion on this issue is proper, the
 9 City has presented evidence that establishes a triable issue of fact
 10 exists as to whether the Massachusetts Hill Mine is connected to other
 11 mines in the area, especially through a hydraulic connection.²
 12 (Eickmeyer Decl., Exh. 2, at 5 ("The [Drew] tunnel is heavily stoped
 13 and in an area of heavily fractured host rock. These conditions would
 14 make it more likely that there are hydraulic connections between the
 15 workings of the different mines.")); (Eickmeyer Decl., Exh. 1, at 3
 16 ("The draining adit [Drew Tunnel] is currently the hydraulic low point
 17 in the mine workings. . . .")); (Bardwick Decl., Exh. 3 [Versar

18
 19 ² The parties submitted sealed documents in support of and in
 20 opposition to this motion. See Barkdwick Decl.; Eickmeyer Decl.; Thayer
 21 Affi. This order quotes some of these documents. Although the parties
 22 stipulated in a February 24, 2005 protective order that certain
 23 documents or discovery responses may be labeled as confidential and
 24 filed under seal, (Stipulation and Protective Order, Docket No. 152 ¶¶
 25 4, 6) that order concerned discovery, under which a document may be
 26 sealed if a "good cause" standard is met. Kamakana v. City and County
 27 of Honolulu, 447 F.3d 1172, 1180 (9th Cir. 2006) (citing Fed. R. Civ. P.
 28 26(c)). But the issue of whether matters discussed in this order are
 sealed is governed by a "compelling reasons" standard under which a
 party must show "compelling reasons supported by specific factual
 findings . . . that outweigh the general history of [public] access" to
 a judicial record shedding light on the judicial process. Id. (internal
 quotations and citations omitted). Since sufficient reasons justifying
 sealing any part of this order have not been presented, all aspects of
 this order are made public.

Report], at 1 ("The Empire Star Mine consists of 15 mines which were originally isolated from each other, but are now joined by over 370 miles of adits, shafts, drifts, and crosscuts. The Empire, North Star, . . . Massachusetts Hill, and Gold Hill Mines were the principal mines merged into the Empire Star Mine."))

Since evidence in the record reveals a genuine issue of material fact exists as to whether the Massachusetts Hill Mine is connected to other surrounding mines, Defendants' motion on this issue is denied.

III. The City's Liability Under CERCLA

Defendants also argue that the City is the owner of "the facility at issue in this litigation," and request the court to enter partial summary judgment "holding the City liable as a present owner under [section 107(a)(1) of] CERCLA." (Defs.' Mot. at 2, 10.) The City responds that "[n]one of the answers filed by the various Newmont defendants included any claims against the City" and that unpled claims may not be raised in a summary judgment motion since discovery has closed. (Pl.'s Opp'n at 7:6-7, 8:2-3.) In their Reply, Defendants' assert that they "need not have asserted a counterclaim or defense against the City because two of the City's causes of action against Defendants state a claim for contribution" and "Defendants alleged several defenses in their Answer relating to the City's liability." (Defs.' Reply at 5:4-6, 6:3-4.)

Defendants' argument in their Reply that the 107(a) liability determination relates to asserted claims and defenses was not raised in their moving papers. New arguments cannot be raised in a reply brief because it disadvantages the opposing side. State of Nevada v. Watkins, 914 F.2d 1545, 1560 (9th Cir. 1990), cert. denied,

1 499 U.S. 906 (1991). Therefore, this portion of Defendants' motion is
 2 denied because it fails to satisfy the notice requirement of Local
 3 Rule 230.

4 **IV. Defendants' liability as past owners or operators of Massachusetts**
 5 **Hill Mine.**

6 Defendants assert that "no Newmont entity is a past owner or
 7 operator of the Massachusetts Hill Mine workings, nor is any Newmont
 8 entity the successor-in-interest to any company that owned or operated
 9 that facility." (Def.s' Mot. at 11:4-6.) The City rejoins that
 10 "Newmont fails to establish this assertion as a matter of undisputed
 11 fact." (Pl.'s Opp'n at 9:13-14.)

12 Section 107(a)(2) of CERCLA creates liability for "any
 13 person who at the time of disposal of any hazardous substance owned or
 14 operated any facility at which such hazardous substances were disposed
 15 of." 42 U.S.C. § 9607(a)(2). The Supreme Court defines an operator
 16 as

17 simply someone who directs the workings of,
 18 manages, or conducts the affairs of a facility.
 19 To sharpen the definition for the purposes of
 20 CERCLA's concern with environmental contamination,
 21 an operator must manage, direct, or conduct
 operations specifically related to pollution, that
 is, operations having to do with the leakage or
 disposal of hazardous waste, or decisions about
 compliance with environmental regulations.

22 United States v. Bestfoods, 524 U.S. 51, 66-67 (1998).

23 Defendants argue that since the Massachusetts Hill Mine was
 24 closed in 1901 it was never thereafter operated for the purposes of
 25 CERCLA. Specifically, Defendants contend: "[t]here is no evidence
 26 that the Massachusetts Hill Mine Workings were ever operated after
 27 1901." (Def.s' Mot. at 11:13-14, Def.s' SUF #22.) However, the City
 28 has presented evidence that the Massachusetts Hill Mine was "operated"

1 after 1901. For example, in a 1975 report entitled "Nevada County,
2 California: Gold Property: A Summary Report," the Newmont Mining
3 Corporation writes that "at the cessation of operations in the mid
4 1950's, the mine workings were allowed to fill with water." (Bardwick
5 Decl. In Opp'n Ex. 2 at 6.) This quote was referring to the Empire
6 Star Mines, but in the report Newmont also notes that "[t]he Empire
7 Star section is a consolidation of many of the early operating mines
8 in the Grass Valley district. Among them being the North Star, . . .
9 Massachusetts Hill . . . and Wisconsin." (Id. at 8.) Accordingly, a
10 trier of fact could reasonably infer that when the Empire Star Mines
11 were flooded the Massachusetts Hill Mine was also flooded. Further,
12 flooding Massachusetts Hill Mine with water could be an operation
13 because it is an "exercise of discretion" "related to pollution" in
14 that flooding the mine may have caused the pollutants in the mine to
15 leak into the water.

16 Evidence also exists in the record that Newmont Mining
17 Corporation, a named defendant, is the successor-in-interest to the
18 company that flooded the Massachusetts Hill Mine. The City proffers
19 evidence that the Empire Star Mines Company owned and operated the
20 Empire Star Mines from 1929-1956. (Pl.'s Response to Def.s' SUF #5
21 (citing Bardwick Decl. in Opp. Exh. 2 at 3, Exh., 33.)) Defendants
22 admit that in 1957 Empire Star Mines Company merged into Newmont
23 Mining Corporation. (Bardwick Decl. Exh. 5, at RFA 12.) "Although
24 CERCLA does not specifically address the issue of successor liability,
25 courts have applied general rules of corporate law and found liability
26 where the successor company expressly assumes the predecessor
27 company's liabilities, or the succession happens through *mergers* or
28 consolidations, or the successor is a continuation of the predecessor

1 company." XDP, Inc. v. Watumull Properties Corp., 2004 WL 1103023,
2 *4 (D. OR., 2004) (citing Atchison, Topeka and Santa Re Ry. Co. v.
3 Brown & Bryant, Inc., 159 F.3d 358, 362 (9th Cir. 1997) (emphasis
4 added).


5 Accordingly, the City's evidence is sufficient for a
6 reasonable trier of fact to find that Newmont Mining Corporation is
7 liable as a past owner or operator of the Massachusetts Hill Mine.
8 Therefore, Defendants' motion on this issue is denied.

9 **V. Summary**

10 For the above stated reasons, Defendants' motion for partial
11 summary judgment is denied.

12 IT IS SO ORDERED.

13 Dated: November 21, 2007

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16 GARLAND E. BURRELL, JR.
17 United States District Judge
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